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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARTIN F. MUELLER,

Petitioner,

vs.

LEO PEVSNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. What constitutes a coercive power or significant encouragement, either overt or covert, that would be deemed in law, a state action or a private decision for which the state is responsible?

2. Can a non-medical opinion of a doctor describing a patient as a malingerer be the basis for the denial of a continued disability pension for a police officer, said disability pension being recognized as a property right under Illinois law, thereby invoking the application of 42 U.S.C. § 1983?

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OPINIONS BELOW

On September 10, 1984, the Honorable John A. Nordberg granted a motion to dismiss petitioner's first amended complaint that petitioner had not stated a cause of action relative to whether there was a state action or that the respondent had acted under "color of state law" required under the Civil Rights Act, sec. 1983 (the judgment order of the Honorable John A. Nordberg is reprinted herein as Appendix B).

On April 22, 1985, the United States Court of Appeals for the Seventh Circuit affirmed the judgment on the basis that state action was not alleged or in the alternative the respondent had not acted under "color of state law"; further the court determined that respondent's characterization of the petitioner as a malingerer was part and parcel of his medical report (the decision of the United States Court of Appeals for the Seventh Circuit is reprinted herein as Appendix A).

JURISDICTION

1. The federal question was raised by the petitioner in his complaint and his first amended complaint for declaratory judgment and other relief alleging that the respondent was acting in concert with the Village of Hillside, Illinois Police Pension Board, to deprive the petitioner of his continued disability pension, which disability was denied without a hearing, when the respondent, hired by the Pension Board, prepared a written medical report describing the petitioner as a malingerer.

That the said cause of action violated the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

2. The petition for writ of certiorari was filed within 90 days after the entry of the judgment by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on April 22, 1985.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Prior to May 28, 1985, the petitioner had been receiving a 65% disability pension from the Hillside, Illinois, Police Pension Fund, which disability pension had been granted on November 3, 1976.

On May 28, 1981, the respondent, Dr. Leo Pevsner, physically examined the petitioner and rendered a medical opinion dated May 28, 1981 which described the petitioner as a malingerer.

Pursuant to applicable law of the State of Illinois governing disability pensions, the petitioner attained a property right once he had been awarded his disability pension.

Likewise, pursuant to the applicable law of the State of Illinois governing disability pensioners, the Hillside, Illinois Police Pension Fund required the petitioner to be

physically reevaluated for the purpose of continuing his disability pension.

The custom and practice or stated policy of the Village of Hillside, Illinoi Police Pension Board was to refer its disability pensioners to the respondent for medical evaluation.

REASONS FOR GRANTING THE WRIT

The petitioner alleged in his first amended complaint either a state action or in the alternative that the respondent was acting under "color of state law" as required in the Civil Rights Act, section 1983.

In its opinion, the United States Court of Appeals for the Seventh Circuit, holds that "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, at 1004 (1982).

In the analysis of the above proposition, the United States Court of Appeals for the Seventh Circuit considered the factors of (1) the extent of the respondent's dependence on public funding; (2) the degree of State regulation over the activity concerned; (3) whether the function performed is traditionally the exclusive province of the State; (4) the extent of the State's power, if any; and over the decisions made by the private party; and (5) whether a symbiotic relationship exists between the State and the private actor.

Analyzing the factors, the United States Court of Appeals held that, even if the Hillside, Illinois Police Pension Board had referred all of its pensioners to the respondent, it felt that such referrals would not have constituted a very significant part of the respondent's medical practice.

Further assuming that it did constitute a significant part of his practice, the United States Court of Appeals maintains that the recent decisions of the United States Supreme Court indicates that little weight is given to the amount of the private party's funding that comes from the State.

However, in analyzing that factor, the petitioner contends that there is another consideration that is vital; namely, that an adverse medical report that is based upon non-professional considerations resulting in the denial of a continued disability pension saves of money to a police pension board which is, herein, the State "that governs the private party"; that is, the respondent, to render such a report.

With reference to the degree of state regulation over the activity concerned, the United States Court of Appeals asserts that granting of a medical license to practice medicine is not an adequate basis upon which to make a Doctor a State actor.

With that observation, the petitioner would not disagree, except that, as the United States Court of Appeals in its opinion correlates that factor with the factor whether there was an exercise of state power over the private person thereby influencing his medical report, then the second factor becomes relevant.

In this instance, the granting of the medical license to the respondent enabled him to practice medicine; based

upon that factor, the respondent was engaged by the Hillside, Illinois Police Pension Fund for the purpose of examining its pensioners; and his first amended complaint, the petitioner states that the pension board acted in concert with the respondent when he prepared a medical report describing the petitioner as a malingerer with the consequence that the Hillside, Illinois Police Pension Board, as the state, herein, exercised a coercive power or significant covert encouragement for the preparation of such a report.

Lastly, in its opinion, the United States Court of Appeals states that there is not a colorable argument that medicine is traditionally exclusive province of the state and that there is no evidence that there is a symbiotic relationship between the respondent and the pension board.

However, in its observations, the United States Court of Appeals does state that, if the board had ordered Pevsner to make the diagnosis as he did, which would be indicative of compelling or influencing the Doctor's diagnosis, the factor that medicine is traditionally the exclusive province of the State would not arise.

In this instance, the petitioner contends that there was this type of coercive power or covert encouragement whereby the Doctor was influenced to describe the petitioner in the non-professional manner; namely, a malingerer.

As far as a symbiotic relationship between Pevsner and the pension board, the United States Court of Appeals relies upon state law to the effect that private doctors who have participated in involuntary commitment of persons to State institutions do not act under "color of state law".

However, in this instance, the cited cases of the United States Court of Appeals, *Hall v. Quillen*, 631 F.2d 1154

(4th Cir. 1980) and *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965) concerned themselves with medical malpractice considerations relative to a doctor's negligence in treating an injury or illness, rather than with a non-professional opinion that the petitioner is a malingerer.

As a result, the petitioner has stated a cause of action, either from the standpoint of a state action or that of a private decision for which a state is responsible.

In conjunction with the issue of non-malingerer the petitioner asserts that the disability pension which he was awarded in 1976 is a property right, and cites *Wendl v. Moline Police Pension Board*, 421 N.E.2d 584 (1981).

In *Wendl*, two policemen who had been awarded disability pensions in 1974 and 1976 asserted that their pensions were property rights after these benefits had been terminated in 1979.

In *Wendl*, the court recognized the property rights in disability pensions when, on page 587, it observed as follows:

> "In the instant case, the rights affected are the plaintiff's property interests in their disability pension benefits, which they have been receiving for a number of years, and the degree of the deprivation is total, for it is the termination of any benefits which was ordered. Both Wendl and Heaton have been receiving disability pension benefits since the mid-1970's when both established their entitlement to pension benefits under the applicable statutory provisions." Ill. Rev. Stat. 1979, ch. 108½, par. 3-101-3-149.

Since the petitioner had been receiving disability pension benefits from November 23, 1976, based upon the above quoted court language, his pension is considered a constitutionally protected property right.

For purposes of emphasis, this argument advanced by the petitioner that the disability pension is a property right is further supported by the court in *Wendl*, when, on page 587, it states:

> "The benefits in the instant case are thus distinctly different from the interests in other pension cases wherein the only asserted interest was in some future expectancy of pension benefits. Plaintiffs herein had shown their entitlement to the pension benefits, and their interests in those benefits, present and future, are sufficient to require significant due process protection when the State, herein the pension board, seeks to deprive the plaintiffs of them."

As a consequence, in *Wendl* the court holds that a police officer who has been receiving a disability pension has established a property right to the benefits under the due process clause of the Fourteenth Amendment of the United States Constitution.

As a result, the respondent's characterization of the plaintiff as a malingerer violated the petitioner's property right to the disability pension in that his disability pension was discontinued due to the respondent's non-medical "opinion that this patient is malingering."

Therefore, the respondent's actions violated the petitioner's due process rights under the Fourteenth Amendment with the result that the plaintiff has a cause of action pursuant to 42 U.S.C. § 1983, due to the Doctor's intentional rendering of a non-medical opinion.

Therefore, since the Illinois case law requires a hearing for the discontinuance of a disability pension, the petitioner's due process rights were violated in that the question of a non-malingerer required direct and cross-examination for the purpose of determining whether malingering was an accurate medical observation part and parcel of the respondent's medical report.

CONCLUSION

For reasons enumerated herein, the writ should be granted.

Respectfully submitted,

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APPENDIX A

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

SUBMITTED APRIL 17, 1985 *
April 22, 1985

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge.*

MARTIN F. MUELLER, *Plaintiff-Appellant,*

No. 84-2652 vs.

LEO PEVSNER, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 3617—**John A. Nordberg,** *Judge.*

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

In 1976 Martin Mueller, a police officer in the Chicago suburb of Hillside, was granted a disability pension and stopped working for the Hillside Police Department. The Hillside Police Pension Fund required Mueller to be re-evaluated periodically to ensure that he was still entitled to receive his disability pension. The defendant in this action, Dr. Leo Pevsner (a physician in private practice), examined Mueller in 1981 for the Hillside Police Pension Board and concluded that (1) Mueller's complaints about his back were not substantiated by any objective physical evidence, and (2) Mueller was malingering. As a result of Dr. Pevsner's comprehensive four-page report (attached to the complaint as an exhibit), the Board stopped Mueller's disability pension.

Mueller sued in federal court pursuant to 42 U.S.C. § 1983, alleging that he had a property right in his pension which he had been deprived of by Pevsner's statement that Mueller was malingering, in violation of the due process and equal protection clauses of the Fourteenth Amendment.[1] The district court granted Pevsner's motion to dismiss because the complaint did not adequately allege that Pevsner acted under color of state law in examining Mueller and drafting his report. Mueller appeals. We affirm.

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[1] Curiously, Pevsner is the only named defendant; Mueller did not sue the members of the Pension Board. Perhaps this is because the Illinois statute that grants the Board the right to re-examine disability pensioners states that police officers "shall abide by" a Board decision that the officer is fit for duty. Ill. Rev. Stat. ch. 108½, § 3-116.

I.

A § 1983 action has two essential elements: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Our inquiry in the case at bar begins and ends with the first element.

It has long been true that private parties may be liable under § 1983 for deprivations of constitutional rights when they have acted together with state officials. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). But before a private person may be held liable for a deprivation, his conduct must be such that he "may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). In determining whether a defendant fits this description, the Supreme Court has articulated a number of relevant factors. These include (1) the extent of the defendant's dependence on public funding; (2) the degree of state regulation over the activity concerned; (3) whether the function performed is traditionally the exclusive province of the state; (4) the extent of the state's power, if any, over the decisions made by the private party; and (5) whether a symbiotic relationship exists between the state and the private actor. *Blum v. Yaretsky*, 457 U.S. 991, 1003-05 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982).[2] Of course the number of factors

[2] Plaintiff's color of state law argument relies to a great extent on *Undergraduate Student Ass'n v. Peltason*, 359 F. Supp. 320, 322 (N.D. Ill. 1973), a case that contains only one sentence about liability of private persons under § 1983. We prefer to base our analysis on Supreme Court decisions of a more recent vintage that contain extensive discussions of the issue.

involved means that a decision in a particular case is highly fact-specific. Yet although the circumstances of each case are significant, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. at 1004.

The first amended complaint contains three allegations pertinent to the issue of state action. Paragraph eight alleges that Illinois law requires disability pensioners to be physically reevaluated.[3] Paragraph thirteen states that the Pension Board's "custom and practice or stated policy . . . was and is to refer its disability pensioners to the defendant for medical evaluation." Finally, paragraph fourteen alleges that Pevsner "was acting in concert with the . . . Pension Board when he prepared a written medical report describing the plaintiff as a malingerer."

Considered in light of the factors enumerated by the Supreme Court, these paragraphs are clearly insufficient to allege that Pevsner acted under color of state law. Even if the Pension Board sends all of its pensioners to Dr. Pevsner, we cannot imagine that this constitutes a very significant part of his medical practice. Even if it did, the Supreme Court's recent decisions demonstrate that little weight is given to the amount of a private party's funding that comes from the government. In both *Rendell-Baker v. Kohn*, 457 U.S. at 832, 840-41, and *Blum v. Yaretsky*, 457 U.S. at 1011, the defendants were private facilities that received over 90% of their funding from the

[3] Actually, Illinois law permits—but does not require—the Pension Board to reexamine police officers receiving disability pensions. Ill. Rev. Stat. ch. 108½, § 3-116.

state, yet in each case the Court found no state action present.

The second and fourth factors—the degree of state regulation and the extent of the state's decision-making power—likewise militate against a finding of state action here. The state regulates physicians in granting licenses to practice medicine, but this is obviously an inadequate basis on which to make a doctor a state actor. *Sumpter v. Harper*, 683 F.2d 106, 108 (4th Cir. 1982). And although the Pension Board apparently requires periodic physical examinations of disability pensioners, it in no way compels or influences the doctor's diagnosis. *See Blum v. Yaretsky*, 457 U.S. at 1007-10, *Rendell-Baker v. Kohn*, 457 U.S. at 841-42. Like the public defender in *Polk County v. Dodson*, 454 U.S. 312, 321 (1981), and the nursing home in *Blum v. Yaretsky*, 457 U.S. at 1008, a doctor's medical judgment in evaluating a patient is governed by the ethical standards of his profession.[4] There is no claim that the Board ordered Pevsner to make the diagnosis he did.

As for the remaining factors, there is not even a colorable argument that medicine is traditionally the exclusive province of the state, and there is no evidence that there is a symbiotic relationship between Pevsner and the Pension Board like that found in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (refusal of restaurant

[4] Plaintiff's complaint and appellate brief are replete with references to Dr. Pevsner's "non-professional medical opinion of malingering." We take issue with this characterization of Pevsner's report. The Pension Board asked Dr. Pevsner to determine whether Mueller was still disabled. It seems to us that the doctor's conclusions that Mueller was not, and that he was malingering, are the essence of a reasoned, professional medical judgment. The Board has a right to know if it is paying benefits to someone who is not entitled to them.

located in public parking garage to serve blacks constituted state action). Having considered all of the Supreme Court's factors, it is apparent that plaintiff's complaint fails to adequately allege the under color of state law element.[5]

For completeness, we note that the complaint also fails under a standard adopted by this court in 1980:

> It is not sufficient to allege that the [private and state] defendants merely acted in concert or with a common goal. There must be allegations that the defendants had directed themselves toward an unconstitutional action by virtue of a mutual understanding. Even were such allegations to be made, they must further be supported by some factual allegations suggesting such a "meeting of the minds."

Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1206 (7th Cir. 1980) (*quoting Sparkman v. McFarlin*, 601 F.2d 261, 268 (7th Cir. 1979) (en banc) (Sprecher, J., concurring)).

The district court's judgment is AFFIRMED.[6]

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[5] This result is consistent with cases holding that private doctors who have participated in involuntarily committing a person to a state institution did not act under color of state law. *See, e.g., Hall v. Quillen*, 631 F.2d 1154, 1155-56 (4th Cir. 1980); *Byrne v. Kysar*, 347 F.2d 734, 736 (7th Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).

[6] Defendant's attorneys have moved to dismiss this appeal as moot because Dr. Pevsner died in November 1984. They claim that under Illinois law an action for libel or slander abates when the defendant dies. The motion is denied. A fair reading of plaintiff's complaint is that it seeks damages for an alleged deprivation of a property interest; it is not essentially a libel action.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge: Honorable John A. Nordberg

Cause No. 83 C 3617 Date September 10, 1984

Title of Cause: Martin F. Mueller v. Leo Pevsner

Brief Statement of Motion: Defendant's Motion to Dismiss

* * * * *

Having considered all the pleadings filed in this case, and the Report and Recommendation of the Magistrate, the court accepts the recommendation of the Magistrate, and grants defendant's motion to dismiss for the reason that plaintiff's complaint does not allege that defendant's action was "state action" or that defendant acted "under color of" state law. As noted by the Magistrate, a complaint alleging that a private individual is liable under 28 U.S.C. Sec. 1983 must assert some nexus between the conduct complained of and the state. (See Magistrate's Report and Recommendation pp. 5-6). The complaint fails to make such assertions. *See also Rendell-Baker v. Kohn,* 102 S. Ct. 2764 (1982) (finding that a state could be held responsible for the private decisions of physicians and nursing home administrators " 'only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be that of the state.' "). *Id.* at 2771. (draft)

/s/ Nordberg, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 3617

MARTIN F. MUELLER,

Plaintiff,

v.

LEO PEVSNER,

Defendant.

TO: HONORABLE JOHN A. NORDBERG, JUDGE
UNITED STATES DISTRICT COURT

HONORABLE SIR:

REPORT AND RECOMMENDATION
of Magistrate James T. Balog

The Plaintiff, Martin Mueller, brings the instant complaint pursuant to 42 U.S.C. § 1983, alleging that the Defendant, Dr. Leo Pevsner, violated his rights to due process and to equal protection of the law under the Fourteenth Amendment. Mueller seeks a declaratory judgment as well as an award of money damages. Dr. Pevsner has moved to dismiss the complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P. This motion has been referred to this Magistrate for a report and recommendation as to its merits.

Mueller's complaint centers around a medical report prepared by Dr. Pevsner on May 28, 1981. In that report, which is attached to the complaint, Dr. Pevsner opined, *inter alia*, that Mueller was malingering. After this report was issued, the Hillside Police Pension Fund, which had

been paying a 65% disability pension to Mueller since November 3, 1976, discontinued payment of this pension. Mueller asserts that Dr. Pevsner, "acting in concert with the Village of Hillside, Illinois Police Pension Board" violated Mueller's property right to his disability pension in contravention of the due process clause of the Fourteenth Amendment by characterizing him as a malingerer. Mueller further alleges that Dr. Pevsner

> has intentionally, maliciously, purposely, or recklessly disregarded the plaintiff's equal protection under the Fourteenth Amendment of the United States Constitution in that the plaintiff has been treated differently from other Illinois Police Officers, who, while being required to be reevaluated for continuing their disability pensions, are not subjected to malicious or irresponsible nonprofessional medical opinions of being characterized malingerers.

(First Amended Complaint, ¶ 17).

As stated above, Dr. Pevsner has moved to dismiss this complaint for failure to state a claim upon which relief can be granted. Rule 12(b)(6), Fed.R.Civ.P. With respect to this type of motion, a court should not dismiss a complaint unless it can be determined beyond a doubt that a plaintiff can prove no set of facts to support his claim and thereby entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In ruling on the motion, the court must accept all material facts alleged by the plaintiff as true and must view such facts in the light most favorable to the plaintiff. However, the court need not accept the legal conclusions, either alleged or inferred, in the complaint. *Mescall v. Burns*, 603 F.2d 1266 (7th Cir. 1979). Because the court should only consider the allegations of facts within the complaint in ruling on this motion, the issue before the court is "not whether plaintiff will ultimately prevail on the merits, but whether he is entitled

to offer evidence in support of his claim." *Griffin v. DeRobertis*, 557 F.Supp. 302, 304 (N.D.Ill. 1983).

Dr. Pevsner first argues that Mueller's claim is barred by the statute of limitations. Dr. Pevsner correctly states that the applicable limitations period is that which an Illinois court would employ had the action been brought before it. Dr. Pevsner then declares that the appropriate Illinois statute of limitations in this case is the one governing slander and libel, to wit: Ill.Rev.Stat. ch.110, § 13-201.[1] In support of this argument, Dr. Pevsner cites *Hines v. Board of Education of Covington, Kentucky*, 667 F.2d 564 (6th Cir. 1982). In *Hines*, the plaintiff, a school teacher who had not been rehired, brought a § 1983 action against the school board alleging that the board had denied her due process by not rehiring her and by failing to grant her a hearing at which she could refute accusations made by the board superintendent that she was involved in illicit sex and illegal drugs. The Sixth Circuit held that the most analogous state court action would be one for slander and that the one-year limitation period governing slander actions brought in Kentucky would apply.[2] Were this the state of Kentucky, Dr. Pevsner's

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[1] Ill.Rev.Stat. ch.110, § 13-201 specifically provides:

> Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.

[2] The Sixth Circuit relied upon the analysis and rationale provided in the opinion of the District Judge, William O. Bertelsman, 492 F.Supp. 469 (E.D.Ky. 1980). Although Judge Bertelsman believed that "a single state statutory analogue for all federal civil rights actions" should be adopted, *Id.* at 472, he was compelled by the doctrine of *stare decisis* to follow the decisions of the Sixth Circuit which refused to apply a uniform limitation period to § 1983 actions. Judge Bertelsman then focused on the two primary factors used by the Sixth Circuit to determine the proper limita-

(Footnote continued on following page)

supplication for a one-year limitations period would be granted. However, this Court is in the state of Illinois, which is part of the Seventh Circuit. And, our Court of Appeals has explicitly rejected the approached employed in *Hines*. In *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert.denied, sub nom., Mitchell v. Beard*, 438 U.S. 907 (1978), the court held that claims brought under the Civil Rights Acts are governed by the Illinois five-year statute of limitations applicable to "all civil actions not otherwise provided for." *See* Ill.Rev.Stat. ch.110, § 13-205. The court stated that there is a "fundamental difference between a civil rights action and a common law tort," *Beard, supra* at 336, quoting Justice Harlan's concurrence in *Monroe v. Pape*, 365 U.S. 167, 194 (1961):

> a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.

Moreover, the court believed that a uniform statute of limitations would elimimate "the often strained process of characterizing civil rights claims as common law torts" as well as the

> [i]nconsistency and confusion [that] would result if the single cause of action created by Congress were frag-

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[2] *continued*
tions period: (1) the interest which the plaintiff seeks to protect and (2) the operative facts comprising the claim. Judge Bertelsman examined the facts of the case and concluded that the primary interest sought to be protected by the plaintiff was her interest in her reputation, not a contractual interest in her job. Next, Judge Bertelsman found that the facts giving rise to the § 1983 action before him and the issues involved were identical to a state action for slander. Hence, he concluded that the Kentucky statute of limitations governing slander governed the suit.

> mented in accordance with analogies drawn to rights created by state law and the several different periods of limitation applicable to each state-created right were applied to the single federal cause of action.

Beard, supra at 337 (quoting *Smith v. Cremins,* 308 F.2d 187, 190 (9th Cir. 1962). In the case at bar, Mueller filed his initial complaint on May 26, 1983, well within the five-year limitations period deemed proper by the Seventh Circuit in *Beard.* Therefore, the District Court should not dismiss Mueller's complaint on the basis of Dr. Pevsner's first argument.

The second argument raised by Dr. Pevsner in support of his motion to dismiss is that Mueller does not allege that Dr. Pevsner acted "under color of state law." This failure by Mueller, contends Dr. Pevsner, renders the complaint insufficient to state a claim upon which relief can be granted. To state a claim under 42 U.S.C. § 1983 a plaintiff must allege that a defendant (1) acted under color of state law and (2) deprived him or her of a right secured by the Constitution or laws of the United States. *Tomkins v. Village of Tinley Park,* 566 F.Supp. 70, 73 (N.D.Ill. 1983); *Crowder v. Lash,* 687 F.2d 996 (7th Cir. 1982). As a general rule, private individuals do not act under color of state law. However, "[p]rivate parties may be liable under 42 U.S.C. § 1983 where they have been jointly engaged with public officers in the denial of civil rights." *Tarkowski v. Robert Bartlett Realty Co.,* 644 F.2d 1204, 1206 (7th Cir. 1980). A complaint alleging that a private individual is liable under § 1983 satisfies the requisite pleading standards when it asserts some joint activity demonstrating "some nexus between the conduct complained of and the state, state official or some state entity." *Musso v. Suriano,* 586 F.2d 59, 64 (7th Cir. 1978), *cert.denied,* 440 U.S. 971 (1979). This nexus may be alleged

in any one of three ways. First, the plaintiff may allege that

> the state affirmatively supported, encouraged or compelled the actionable conduct of the private party. [. . .] Second, plaintiff may claim that the private individual was performing a function traditionally and exclusively performed by the sovereign. [. . .] Finally, plaintiff may allege that the private actor, as a result of his conduct, became an instrumentality of state power.

Tomkins, supra at 74. (Citations omitted.)

In the case at bar, the only joint activity between Dr. Pevsner and a state entity alleged by Mueller is found in Paragraph 14 of the First Amended Complaint. That paragraph states:

> the defendant was acting in concert with the Village of Hillside, Illinois Police Pension Board when he prepared a written medical report describing the plaintiff as a malingerer.

This statement does not contain any allegations of facts sufficient to satisfy the pleading requirements set forth in *Musso* and *Tomkins*. Instead, it asserts a conclusion of law which is unsupported by any factual allegation in the complaint. Hence, it should be ignored by the District Court. When Mueller's First Amended Complaint is stripped of this conclusory paragraph, it contains no material facts indicating any joint activity between Dr. Pevsner and the state, a state official, or some state entity. Thus, it fails to allege that Dr. Pevsner acted "under color of state law," and thereby fails to state a claim.

This case is factually similar to the cases of *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965), *cert.denied*, 383 U.S. 913 (1966) and *Watkins v. Roche*, 529 F.Supp. 327 (S.D.Ga. 1981), where private physicians were sued under 42 U.S.C. § 1983 for signing certificates that resulted in the involun-

tary commitments of the plaintiffs to state mental institutions. The courts in those two cases refused to hold that the private physician acted under color of state law. It is recommended that the District Court follow suit in the instant case. As the *Watkins* court eloquently noted:

> To open physicians to federal suit by decreeing that they act for the state in making purely medical decisions would effectively chill the use, and accompanying benefit, of a private physician's judgment . . . simply because the physician may not be willing to give it for fear of being exposed to a lawsuit.

Watkins, supra at 330.

Because Mueller has failed to allege that Dr. Pevsner was acting under color of state law, IT IS RECOMMENDED that the District Court GRANT the Motion to Dismiss.

Respectfully submitted,

/s/ James T. Balog
United States Magistrate

DATE: AUGUST 29, 1984.

The parties may serve and file written objections to this Report and Recommendation within ten (10) days hereof.

Copies have, this date, been mailed to:

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